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EROSION OF STATE SOVEREIGN IMMUNITY AND THE ELEVENTH AMENDMENT BY FEDERAL DECISIONAL LAW

PAUL C. WEICK*

AMMENDMENT XI of the United States Constitution provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . .

The efforts of the courts to reconcile the purposes of the eleventh amendment with the supremacy of federal law have produced controversial results. The shield of sovereign immunity afforded the states by the eleventh amendment has been worn dangerously thin. No attempt will be made to detail the amendment's history; this has already been accomplished by others.¹ However, various eleventh amendment principles have been established by judicial decisions.

The eleventh amendment is not to be interpreted literally, but according to the "fundamental rule of jurisprudence" that "a state may not be sued without its consent."² While the amendment does not literally bar suits against a state by its own citizens, the Supreme Court has consistently held that an unconsenting state is immune from suits brought in federal courts by her own citizens as well as by citizens of another state.³ Also, the Court has held that the applicability of the eleventh amendment "is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears

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¹ Details of the eleventh amendment's history can be found in *Edelman v. Jordan*, 415 U.S. 651, 660-63 (1974), *Monaco v. Mississippi*, 292 U.S. 313, 323-28 (1934) and Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1422-41 (1975) [hereinafter cited as Nowak].

² *Ex parte New York*, 256 U.S. 490, 497 (1921).

³ *E.g.*, *Edelman v. Jordan*, 415 U.S. 651 (1974); *Parden v. Terminal R.R.*, 377 U.S. 184 (1964); *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299 (1952); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945); *Duhne v. New Jersey*, 251 U.S. 311 (1920); *Ex parte Young*, 209 U.S. 123 (1908); *Hans v. Louisiana*, 134 U.S. 1 (1890).

from the entire record."⁴ Thus, even though a state is not named a party to the action, the suit may nonetheless be barred by the eleventh amendment, when the state in reality is the party.⁵ In *Ford Motor Co. v. Department of Treasury*,⁶ the Court said, "[W]hen the action is in essence one for recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants."⁷ Additionally, in *Dugan v. Rank*⁸ the Court noted:

The general rule is that a suit is against the sovereign if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration," or if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act."⁹

This cloak of immunity in which state officials can wrap themselves to protect against damage suits brought by citizens under Civil Rights Acts has turned upon the office held by the official and his motive. Thus, through pigeonholing the amount of immunity to the office held, the Court has divided the defenses available to fit the functions performed by the officials. Recent court decisions on the extent of immunity available to an officeholder have led to varied results from the viewpoint of state officials. In general, officials operating within the judicial and legislative branches have absolute immunity, while those in the executive branch have only qualified immunity.

This article will explore recent court decisions discussing the issues of sovereign state immunity from suit in the federal courts via the eleventh amendment and the scope of immunity which state officials have in damage suits under Civil Rights Acts.

I. SUITS AGAINST STATE OFFICERS AND AVAILABLE RELIEF

A. *Ex parte Young*

One judicially created exception to the language of the eleventh amendment is the *Ex parte Young* doctrine. In *Ex parte Young*¹⁰ the Court

⁴ *Ex parte New York*, 256 U.S. 490, 500 (1921).

⁵ *Scheuer v. Rhodes*, 416 U.S. 232, 237 (1974).

⁶ 323 U.S. 459 (1945).

⁷ *Id.* at 464. Of course the bar of the eleventh amendment does not extend to counties and municipal corporations. Whether a political entity is an arm of the state or another political subdivision "depends in part upon the nature of the entity created by state law." Thus, the Court in *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 97 S. Ct. 568, 572 (1977) held that a local school board under Ohio law, on balance, was "more like a county or city than it is like an arm of the State."

⁸ 372 U.S. 609 (1963).

⁹ *Id.* at 620 (citations omitted).

¹⁰ 209 U.S. 123 (1908).

held that state officials could be enjoined by a federal court as individuals from enforcing a state statute which violated the Federal Constitution. Soon after the Minnesota state legislature passed acts establishing various railroad shipping rates, the Northern Pacific Railway Co. filed suit in federal court to enjoin enforcement of the state rates. Even though the federal court had entered a preliminary injunction restraining enforcement of these rates, the state attorney general, Edward Young, obtained a writ of mandamus in state court, in violation of the federal court injunction, directing the railroad to obey the state law. Young was adjudged in contempt of court. He thereafter applied to the Supreme Court for a writ of habeas corpus, arguing that he was immune from suit in federal court because of the eleventh amendment.

The Court ruled that the injunction against Young was valid for at least three reasons: (1) the Attorney General was sued as an individual; (2) the court was merely restraining the state officer from acting unconstitutionally; and (3) the federal court was not interfering with the sovereign authority of the state because the state cannot violate the Constitution. The Court said:

It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional. If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States.¹¹

The idea that the court was enjoining the individual rather than the state was pure fiction, because the state could not act other than through its officials.¹² As Clyde E. Jacobs notes, "The Court has often closed its eyes, quite deliberately, to the reality of whether a decree against an officer would operate against the government, as, in fact, it did in *Ex parte Young* and in later cases in which *Young* was followed."¹³ This fiction has also created a dichotomy in the state action doctrine: enforcement of a state act is state action under the fourteenth amendment, but is viewed as an

¹¹ *Id.* at 159-60.

¹² See Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. CHI. L. REV. 435, 437, (1962).

¹³ C. JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* 157 (1972) [hereinafter cited as JACOBS].

individual act under the eleventh amendment.¹⁴ The upshot of the *Young* rule though, was the reiteration of the supremacy of the Federal Constitution over the states; federal courts were opened to enforce this axiom. The *Young* doctrine, however, might have completely nullified the eleventh amendment by judicial decisions if the dangerous trend of overextension had not been at least temporarily arrested by *Edelman v. Jordan*.¹⁵ Rather than permitting suits to be brought against state officials regardless of the relief sought, *Edelman* restricted the relief available.

B. *Edelman v. Jordan* and the Retroactive-Prospective Relief Distinction

Edelman was a class action brought under 42 U.S.C. § 1983 which sought a federal court injunction requiring state officials to comply with federal welfare regulations and to disburse benefits withheld as a result of past noncompliance. The Court upheld the grant of prospective injunctive relief against state officers, but refused to extend the principle of *Ex parte Young* to retroactive relief as well.

We do not read *Ex parte Young* or subsequent holdings of this Court to indicate that any form of relief may be awarded against a state officer, no matter how closely it may in practice resemble a money judgment payable out of the state treasury, so long as the relief may be labeled "equitable" in nature.¹⁶

The Court held that the district court had exceeded its jurisdiction, as limited by the eleventh amendment, in ordering the restitution of benefits wrongfully withheld. While retroactive relief seemed to the Court similar to damages, the fiscal consequences of prospective relief were a "necessary consequence of compliance in the future" with federal law and thus had only "ancillary" fiscal effect, permissible under *Ex parte Young*.¹⁷

Although *Edelman* serves to protect the state from retroactive relief, its protection is still too limited.¹⁸ The fiscal consequences on the state treasury from prospective injunctive relief will often be more than just ancillary.¹⁹ Indeed, the *Edelman* Court observed that "the difference between the type of relief barred by the eleventh amendment and that permitted

¹⁴ See *Home Tel. & Tel. Co. v. Los Angeles*, 227 U.S. 278 (1913); C. WRIGHT, LAW OF FEDERAL COURTS 208 (3rd ed. 1976).

¹⁵ 415 U.S. 651 (1974).

¹⁶ *Id.* at 666.

¹⁷ *Id.* at 668.

¹⁸ See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 459-60 (1976) (Stevens, J., concurring), in which a distinction is drawn between funds from the state treasury and separate and independent state pension funds.

¹⁹ Compare *Edelman v. Jordan*, 415 U.S. 651, 682 (1974) (Douglas, J., dissenting), with *id.* at 666 n. 11.

under *Ex parte Young* will not in many instances be that between day and night."²⁰

The difficulty, however, of complying with a court's order may be more directly related to the size of the award than to its nature.²¹ For instance, the court of appeals in *Edelman* noted the far larger expenditure that was required by the prospective part of the court's order.²²

A more illuminating example of the problems associated with prospective relief is found in *Griffin v. School Board of Prince Edward County*.²³ In *Griffin* the Attorney General of Virginia argued that the suit, brought to enjoin the school board, other agencies, and certain officers "from refusing to maintain and operate an efficient system of public free schools,"²⁴ was a proceeding against the state barred by the eleventh amendment. The Court tersely responded, "It has been settled law since *Ex parte Young* . . . that suits against state and county officials to enjoin them from invading constitutional rights are not forbidden by the Eleventh Amendment."²⁵ As noted by Clyde E. Jacobs:

The statement in *Griffin* simply bypassed substantial objections that the relief sought by the petitioner would require a levy of taxes and the expenditure of public money, that it would interfere with public administration, and that it would simultaneously forbid the government from doing certain things while, in effect, commanding it to do other things.²⁶

²⁰ *Id.* at 667. The Court continued:

The injunction issued in *Ex parte Young* was not totally without effect on the State's revenues, since the state law which the Attorney General was enjoined from enforcing provided substantial monetary penalties against railroads which did not conform to its provisions. . . . But the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often inevitable consequence of the principle announced in *Ex parte Young*. . . .

Id. at 667-68.

²¹ See Note, *Attorneys' Fees and the Eleventh Amendment*, 88 HARV. L. REV. 1875, 1881 n.36 (1975).

²² *Jordan v. Weaver*, 472 F.2d 985, 991 (7th Cir. 1973), *rev'd sub nom.*, *Edelman v. Jordan*, 415 U.S. 651 (1974).

²³ 377 U.S. 218 (1964).

²⁴ *Id.* at 224.

²⁵ *Id.* at 228.

²⁶ JACOBS, *supra* note 13, at 157-58. See also *Bradley v. Milliken*, 484 F.2d 215, 272 n.8 (6th Cir. 1973) (Weick, J., dissenting), *rev'd on other grounds*, 418 U.S. 717 (1974).

The orders entered by the District Court have certainly been expended on the public treasury, have interfered with public administration, have restrained the State from acting, and have compelled it to act, which is the test for determining whether the action is against the State, under *Dugan v. Rank* [372 U.S. 609 (1963)]. Such an action is clearly proscribed by the Eleventh Amendment.

Despite the simplicity of the conclusion that prospective relief has only ancillary fiscal consequences and is not barred by the eleventh amendment, the Sixth Circuit has recently reaffirmed this principle in *Bradley v. Milliken*.²⁷ In *Bradley* the state defendants relied upon *Edelman v. Jordan* in contending that the district court could not compel the state to pay for any part of the educational components of the proposed school desegregation plan. The court, however, noted that the order was part of a prospective plan to comply with a constitutional requirement to eradicate all vestiges of de jure segregation. Under *Ex parte Young* such prospective relief was not barred by the eleventh amendment, and the state was ordered to bear 75 per cent of the cost of 150 school buses and 75 per cent of the cost of an additional 100 school buses.²⁸ The purchase of 250 buses would require the expenditure of millions of dollars by the state, including the daily costs of operation and the employment of bus drivers. This can hardly be classified as "ancillary". It further means that state taxpayers not living in the Detroit District are being taxed for the desegregation of the Detroit school system. Normally, funds for the operation of public schools are obtained principally by taxation of real property within the school district. The adverse effect on the operation of the Detroit school system is given no consideration.

Although it would seem better to weigh the disruption that the type of relief is likely to have on the state's fiscal policy and public administration in light of the principles of the eleventh amendment, the law at present only makes a rigid distinction between retroactive and prospective relief.

C. Implied Waiver of the Eleventh Amendment

Another exception to the absolute language of the eleventh amendment is the doctrine of waiver. It has long been held that a state may waive its eleventh amendment protection.²⁹ The concept of implied waiver was explicitly recognized in *Parden v. Terminal R.R.*³⁰ In *Parden*, employees of a railroad owned and operated by the State of Alabama sought recovery against the state under the Federal Employers Liability Act (FELA) for injuries sustained on the job. The Court held that Congress intended to subject states which operated railroads in interstate commerce to liability under the FELA although it had not evidenced an express intent in the

²⁷ 540 F.2d 229 (6th Cir. 1976), cert. granted, 97 S.Ct. 380 (1976).

²⁸ See also *Bradley v. Milliken*, 519 F.2d 679 (6th Cir. 1975), cert. denied, 423 U.S. 930 (1975).

²⁹ See *Ashton v. Cameron County Dist.*, 298 U.S. 513, 531 (1936); *Clark v. Barnard*, 108 U.S. 436, 447 (1883).

³⁰ 377 U.S. 184 (1964). See also *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959).

statute or legislative history³¹. The operation of a railroad by the state was a proprietary rather than a governmental function. It is clear that Alabama waived its eleventh amendment protection against FELA suits by implication when it began operating a railroad in interstate commerce. It was only fair that it be subjected to the same liability as is imposed upon private carriers arising out of the operation of a railroad.

Parden was later modified by the Court in *Employees v. Department of Public Health and Welfare*.³² An action was brought against the state by employees of various state hospitals and schools for overtime compensation due to them under the Fair Labor Standards Act (FLSA). They based their suit on the 1966 Amendments to the FLSA which created a federal cause of action, but the Court held that there was no congressional intent in the statute which provided for the state employees to sue the state. Such a course of action was left to the Secretary of Labor.³³

Employees suggests that a state does not waive the amendment's protection unless there is a specific grant of jurisdiction by Congress to federal courts in federal legislation which covers the states. *Employees* also posed the governmental-proprietary distinction of the state activity. In *Employees* the state hospitals and training schools were public governmental institutions and the state had no real option to discontinue their operation; *Parden* on the other hand, involved a proprietary, profit-making activity — the state-owned railroad. *Employees* implies that as the regulated state enterprise approaches a purely governmental activity, a court should require clearer proof of an express waiver. Juxtaposed alongside the governmental-proprietary distinction, *Employees* can be interpreted to require Congress to give actual notice to the states within a sufficient time frame so as to offer each state the opportunity to elect between participating in the federal program, and thus waiving their immunity, and retaining the eleventh amendment protection by staying out of the program.

The third major case to deal with the doctrine of implied waiver was *Edelman v. Jordan*.³⁴ Before deciding whether the retroactive award was barred by the eleventh amendment, the *Edelman* Court had to decide whether the state had waived the amendment's protection. The Court found that there was no implied waiver "because the necessary predicate for that doctrine was congressional intent to abrogate the immunity conferred by the eleventh amendment."³⁵ *Edelman* required that the federal legislation which

³¹ 377 U.S. at 196-98.

³² 411 U.S. 279 (1973).

³³ *Id.* at 285-86.

³⁴ 415 U.S. 651 (1974).

³⁵ *Edelman v. Jordan*, 415 U.S. 651, 45-52 (1974) (characterizing *Edelman*).

was relied upon by the plaintiffs contain an express authorization to sue a class of defendants including states. Mere participation by the state in the welfare program was not sufficient to establish a waiver.³⁶ The Court also rejected the use of 42 U.S.C. § 1983 as a substitute for an express authorization to sue. The Court said:

But it has not heretofore been suggested that § 1983 was intended to create a waiver of a State's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself.³⁷

While *Edelman* properly limits the use of implied waiver, the perimeters of *Edelman* have been further defined by the recent case of *Fitzpatrick v. Bitzer*.³⁸ In *Fitzpatrick* plaintiffs sued for prospective and retroactive relief for losses of retirement benefits caused by the state's discrimination, and for attorney fees. They sued under the 1972 Amendments to Title VII of the Civil Rights Act of 1964,³⁹ which authorized federal courts to award money damages to private individuals against a state government that has been found to have subjected that person to employment discrimination. The Court upheld not only the prospective injunctive relief, but also upheld the backpay award. Although it was in the form of retroactive relief barred by *Edelman*, such relief is permissible when specifically authorized by Congress pursuant to section 5 of the fourteenth amendment. The *Fitzpatrick* Court distinguished *Edelman* by noting that the "threshold fact of congressional authorization" for a citizen to sue his state employer was absent in *Edelman*.⁴⁰ Thus, *Fitzpatrick* held that the eleventh amendment is "necessarily limited by the enforcement provisions of section 5 of the fourteenth amendment."⁴¹ This result is not surprising because *Parden*, through the Commerce Clause, also effectively limits the eleventh amendment. *Fitzpatrick*, however, illuminates the proper focus of the eleventh amendment. Since Congress in its constitutional powers can waive the states' sovereign immunity from individual citizen suits in federal court, the purpose of the eleventh amendment is to prevent *federal courts* from infringing upon the sovereignty of the states.⁴²

D. Attorneys' Fees

The American rule does not permit the awarding of attorneys' fees

³⁶ 415 U.S. at 673.

³⁷ *Id.* at 675-77. See also *Martin v. University of Louisville*, 541 F.2d 1171 (6th Cir. 1976); *Long v. Richardson*, 525 F.2d 74 (6th Cir. 1975).

³⁸ 427 U.S. 445 (1976).

³⁹ 42 U.S.C. §§ 2000e-16 (Supp. V, 1975).

⁴⁰ 427 U.S. at 452.

⁴¹ *Id.* at 456.

⁴² See generally Nowak, *supra* note 1.

to the winning party, unless the legislature or the contracting parties provide for such compensation.⁴³ Two exceptions to this rule, however, have been established by the courts in the exercise of their equitable powers. First, if the losing party has acted in bad faith, the successful litigant may recover attorneys' fees. The award in such a situation is punitive.⁴⁴ Bad faith "may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation."⁴⁵ The second exception⁴⁶ "has been to award expenses where a plaintiff has successfully maintained a suit, usually on behalf of a class, that benefits a group of others in the same manner as himself."⁴⁷ This prevents unjust enrichment of the class at the expense of the litigating plaintiff. In this way the court's award "will operate to spread the costs proportionately among them."⁴⁸ Generally, the benefit conferred must be substantial, and the class ascertainable.⁴⁹ Nevertheless, the courts cannot award attorneys' fees on the "private attorney general" approach without prior legislative authority.⁵⁰

Recently, debate within the federal courts has raged over the award of attorneys' fees and the limits placed on them by the eleventh amendment. The Supreme Court has never fully addressed the question whether the eleventh amendment bars the award of attorneys' fees against an unconsenting state or against state officials acting in their official capacities.⁵¹ In *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*,⁵² the Court reserved this issue. Again, in *Fitzpatrick v. Bitzer*,⁵³ the Court declined to answer this question because Congress, through its fourteenth amendment powers, pro-

⁴³ See generally *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247-71 (1975); *Hall v. Cole*, 412 U.S. 1 (1973); *Mills v. Electric Auto-Lite*, 396 U.S. 375, 392 n. 16 (1970); *Huecker v. Milburn*, 538 F.2d 1241, 1245-46 (6th Cir. 1976).

⁴⁴ *Hall v. Cole*, 412 U.S. 1, 5 (1973).

⁴⁵ *Id.* at 15.

⁴⁶ Of course courts can assess attorneys' fees on a party for "willful disobedience of a court order." *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 426-28 (1923). See also *Fleischman Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 712 (1967).

⁴⁷ *Mills v. Electric Auto-Lite*, 396 U.S. 375, 392 (1970).

⁴⁸ *Id.* at 394.

⁴⁹ *Id.* at 393-94. See also *Hall v. Cole*, 412 U.S. 1, 5-6 (1973). For cases which discuss attorneys' fees awards against state officials acting in their personal capacity, see *Class v. Norton*, 505 F.2d 123, 127-28 (2d Cir. 1974); *Skehon v. Board of Trustees*, 501 F.2d 31, 43-44 & n. 7 (3d Cir. 1974), vacated on other grounds, 421 U.S. 983 (1975).

⁵⁰ *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). See also Special Project, *Recent Developments in Attorneys' Fees*, 29 VAND. L. REV. 685, 719-33 (1976) [hereinafter cited as Special Project].

⁵¹ Special Project, *supra* note 50, at 733-42.

⁵² 421 U.S. 240, 269-70 n. 44 (1975).

⁵³ 427 U.S. 445, 456-57 (1976).

vided for attorneys' fees by statute under Title VII.⁵⁴ However, the lower courts are divided on this issue.⁵⁵

The Sixth Circuit held that the eleventh amendment in this situation bars the award of attorneys' fees. In *Jordan v. Gilligan*,⁵⁶ the court, after careful analysis of precedent, relied on *Edelman* to hold that recovery of attorneys' fees from the unconsenting state or public officials acting in their official capacities would be from the public trough. The eleventh amendment bars an award of attorneys' fees because it is "measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials."⁵⁷

An example of cases holding to the contrary are *Souza v. Travisono*⁵⁸ and *Bond v. Stanton*.⁵⁹ In *Souza* the First Circuit characterized attorneys' fees as "part of the litigation expense."⁶⁰ The Court, relying upon *Fairmont Creamery Co. v. Minnesota*,⁶¹ concluded that once a state and its officials are amenable to suit in federal court, a state loses "some of its sovereign character."⁶²

However, reliance on *Fairmont Creamery* to impose attorneys' fees is misplaced. That case dealt with whether the State of Minnesota, as a losing party before the Supreme Court, had to pay the cost of reproducing the record. Court rules, Congressional statutory authority, and the long practice of the Court, mandated an affirmative answer. Clearly, the payment of attorneys' fees with statutory authority, as opposed to without such authority, is distinguishable from the eleventh and fourteenth amendments.⁶³

In *Bond v. Stanton*, the Seventh Circuit stated that it was compelled by the Supreme Court's summary affirmance without opinion in *Sims*

⁵⁴ 42 U.S.C. § 2000e-5(k) (1970). See also *Cunningham v. Grayson*, 541 F.2d 538 (6th Cir. 1976).

⁵⁵ *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 269-70 n. 44 (1975); *Huecker v. Milburn*, 538 F.2d 1241, 1244 n. 5 (6th Cir. 1976).

⁵⁶ 500 F.2d 701, 709-10 (6th Cir. 1974), cert. denied, 421 U.S. 991 (1975).

⁵⁷ *Id.* at 710, quoting *Edelman v. Jordan*, 415 U.S. 651, 668 (1974). See also *Huecker v. Milburn*, 538 F.2d 1241, 1244 (6th Cir. 1976); *Taylor v. Perini*, 503 F.2d 899, 901 (6th Cir. 1974), vacated on other grounds, 421 U.S. 982 (1975). Both cases reaffirmed the Sixth Circuit's decision of *Jordan v. Gilligan*.

⁵⁸ 512 F.2d 1137 (1st Cir. 1975), vacated on other grounds, 423 U.S. 809 (1976).

⁵⁹ 528 F.2d 688 (7th Cir. 1976), vacated in light of the *Civil Rights Attorneys' Fees Awards Act*, 97 S. Ct. 479 (1976).

⁶⁰ 512 F.2d at 1140.

⁶¹ 275 U.S. 70 (1928).

⁶² 512 F.2d at 1140, quoting *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70, 77 (1928).

⁶³ See *Phonographic Recording v. Blitzer*, 427 U.S. 445, 456-57 (1976).

v. *Amos*⁶⁴ to award attorneys' fees against state officials sued in their official capacity under 42 U.S.C. § 1983. The eleventh amendment bar did not stop a three judge panel in *Sims* from awarding attorneys' fees in a reapportionment case against various Alabama state officials. Further, the *Bond* Court noted that it was controlled by the statement in *Hicks v. Miranda*⁶⁵ that "the lower courts are bound by summary decisions by this Court 'until such time as the Court informs [them] that [they] are not.'"⁶⁶

The full precedential effect of *Sims*, however, must be placed in perspective. The Supreme Court has twice said that it did not address this question, even citing *Sims* one time before making this statement.⁶⁷ The Sixth Circuit in *Jordan v. Gilligan* rejected the *Sims* precedent, pointing out that the question was still open.⁶⁸

Attorneys' fees awards, like damages, are a form of compensation to private litigants paid with state funds if assessed against the state. These awards raise the same problems of unfairness and inhibition of official decision-making as do awards of damages. These are hardly permissible "ancillary effects" on the state treasury within the meaning of *Edelman v. Jordan*. Indeed, the amount of attorneys' fees asked for in recent civil rights cases often amount to large sums of money. For example, in the recent Kalamazoo, Michigan busing case, a United States District Court approved attorneys' fees amounting to \$350,000.⁶⁹

The Sixth Circuit's analysis in *Jordan v. Gilligan*, barring the award of attorneys' fees against the state, squares with the analytical framework

⁶⁴ 340 F. Supp. 691 (M.D. Ala. 1972), *aff'd*, 409 U.S. 942 (1972).

⁶⁵ 422 U.S. 332 (1975).

⁶⁶ *Id.* at 344-45, quoting *Doe v. Hodgson*, 478 F.2d 537, 539 (2d Cir. 1973), *cert. denied sub nom.*, *Doe v. Brennan*, 414 U.S. 1096 (1973).

⁶⁷ *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 269 n. 44 (1975).

⁶⁸ 500 F.2d 701, 709 (6th Cir. 1974). A student note has also pointed out that *Sims* is weak precedent:

"The court [in *Sims*] limited its discussion of the eleventh amendment issue to the following footnote:

Individuals who, as officers of a state, are clothed with some duty with regard to a law of the state which contravenes the Constitution of the United States, may be restrained by injunction, and in such a case the state has no power to impart to its officers any immunity from such injunction or from its consequences, including the court costs incident thereto.

This emphasis upon the state's inability to immunize its officials who have been sued under the doctrine of *Ex parte Young* indicates a failure to confront the underlying reality recognized in *Edelman*: that, although the award nominally ran against the named defendants, it would almost certainly be paid by the state. Because *Sims* offered no further support for its holding on the eleventh amendment issue, it is apparent that it does not survive *Edelman*."

Note, *Awarding Attorney's Fees Against a State Official Sued in His Official Capacity After Edelman v. Jordan*, 55 B.U.L. REV. 228, 236 (1975).

⁶⁹ *The Sunday Plain Dealer* (Cleveland), Nov. 7, 1976 § 1, at 11, col. 6. See *Oliver v. Kalamazoo Bd. of Educ.*, 73 F.R.D. 30 (W.D. Mich. 1976).

of *Edelman*. *Edelman* established a scale of barring retroactive relief of damages at one end, and permitting prospective injunctive relief at the other end. Attorneys' fees awards are encompassed within retroactive relief because they are measured against a past legal action.

A recent development in the area of attorneys' fees is the Civil Rights Attorneys' Fees Awards Act of 1976.⁷⁰ It provides, in part, that for a civil suit arising under certain civil rights laws, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys' fee as part of the costs."

The law was passed to plug the gap created by the *Alyeska Pipeline* case,⁷¹ and "to harmonize the incongruity of allowing attorney fees in Title VII employment discrimination cases, but disallowing fees in such cases brought under § 1981."⁷² Generally courts will not award attorneys' fees in cases brought in bad faith, or which are frivolous. Rather the cost award may be made to a party who has prevailed on an important matter in the lawsuit or otherwise vindicates the rights of the litigants. The fees awarded must be reasonable and not such as to be a windfall for the attorney.⁷³

The *Fitzpatrick* case provided Congress with the necessary authority to pass this bill. Because section five of the fourteenth amendment can be utilized to circumvent the eleventh amendment, state officials can now be sued in their official capacities for attorneys' fees in civil rights cases.⁷⁴ The same criticism previously advanced concerning the raids on the state treasuries are equally applicable to this new law. The balancing between unrestrained state actions and officials hesitant to act for fear of liability becomes

⁷⁰ Act of Oct. 19, 1976, Pub. L. No. 94-559, 90 Stat. 2641 (to be codified in 42 U.S.C. § 1988). This law states:

SEC. 2. That the Revised Statutes section 722 (42 U.S.C. 1988) is amended by adding the following: "In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX or Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

⁷¹ The following discussion is based generally on an analysis of this act in ADMINISTRATIVE OFFICE OF THE U.S. COURTS & FED. JUDICIAL CENTER, 8 THIRD BRANCH, BULL. OF THE FED. COURTS, No. 11 (1976).

⁷² *Wade v. Mississippi Cooperative Extension Serv.*, 424 F. Supp. 1242, 1252 (N.D. Miss. 1976).

⁷³ See *Stanford Daily v. Zurcher*, 64 F.D.R. 680 (N.D. Cal. 1974). See also *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975), cert. denied sub nom., *Perkins v. Screen Extras Guild, Inc.*, 425 U.S. 951 (1976); *Evans v. Sheraton Park Hotel*, 503 F.2d 177, 186-88 (D.C. Cir. 1974); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974) (listing the twelve relevant criteria to consider in awarding attorneys' fees).

too one-sided if every state action is later subject to second guessing in the courtroom. This law adds to the imbalance.

II. EXECUTIVE IMMUNITY UNDER 42 U.S.C. § 1983.

The courts have uniformly held that states are not "persons" under the terms of 42 U.S.C. § 1983,⁷⁵ and therefore are not subject to damage suits based on this statute. *Monroe v. Pape*⁷⁶ held that municipal corporations are not "persons" within the meaning of the statute. Thus, the Supreme Court in *Fitzpatrick v. Bitzer*⁷⁷ cited *Monroe* and then noted "[t]hat being the case, it could not have been intended to include States as parties defendant."⁷⁸ The history of the statute supports this view.⁷⁹ Also, as noted in *Edelman v. Jordan*, section 1983 did not abrogate a state's eleventh amendment protection merely because an action could be brought under section 1983 against state officers.⁸⁰

Since the eleventh amendment is a bar to recovering money damages from officers when the award must come from the state treasury, plaintiffs have sought damages by suing the official under section 1983. Section 1983 is silent in regard to immunity against its provisions.⁸¹ However, since 1951 it has been assumed that legislators and judges enjoy an absolute immunity from suit under section 1983. *Tenney v. Brandhove*⁸² has been interpreted to exclude legislators from the reach of section 1983, noting that the English immunity for statements made in Parliament had been carried over to the United States and codified in the speech and debate clause of the Constitution.⁸³ Justice Frankfurter, speaking for the Court, said:

⁷⁴ See *Wade v. Mississippi Coop. Extension Serv.*, 424 F. Supp. 1242 (1976) (Civil Rights Attorneys' Fees Awards Act of 1976 applied to section 1981 suit brought prior to act becoming law).

⁷⁵ 42 U.S.C. § 1983 (1970) reads:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

⁷⁶ 365 U.S. 167 (1961).

⁷⁷ 427 U.S. 445 (1976).

⁷⁸ *Id.* at 452.

⁷⁹ Nowak, *supra* note 1, at 1464-68.

⁸⁰ 415 U.S. at 675-77.

⁸¹ The question is one of statutory construction. See *Wood v. Strickland*, 420 U.S. 308, 316 (1975); *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951).

⁸² 341 U.S. 367 (1951).

⁸³ U.S. CONST. art. I, § 6. As to the scope of legislative immunity and the speech and debate clause, see *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975); *Doe v. McMillan*, 412 U.S. 306 (1973); *Gravel v. United States* 408 U.S. 606 (1972), *United States v. Brewster*, 408 U.S. 501 (1972), *Powell v. McCormack*, 395 U.S. 486 (1969).

The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in *Fletcher v. Peck*, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned.⁸⁴

In *Pierson v. Ray*⁸⁵ the Court noted that it could find no evidence that Congress intended to "abolish wholesale all common-law immunities" with the passage of the civil rights laws.⁸⁶ The Court held that judges were immune from liability under section 1983. The Court rationalized that

It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.⁸⁷

The immunity defense was severely restricted, however, for state executive officers when suits are brought under section 1983. In *Scheuer v. Rhodes*⁸⁸ the personal representatives of the estates of three students who died during the civil disorder on the Kent State University campus in May, 1970 brought suit under 42 U.S.C. § 1983. The plaintiffs sought damages against the Governor of Ohio, the Adjutant General and certain officers of the Ohio National Guard, all of the members of the Guard, and the President of Kent State University.

The Court conceded that *Edelman v. Jordan* and other Supreme Court cases had established that *Ex parte Young* was of no avail to a plaintiff

⁸⁴ 341 U.S. at 377.

⁸⁵ 386 U.S. 547 (1967).

⁸⁶ *Id.* at 554.

⁸⁷ *Id.* See also *Imbler v. Pachtman*, 424 U.S. 409, 417-18 (1976); *Scheuer v. Rhodes*, 416 U.S. 232, 243-44 (1974).

⁸⁸ 416 U.S. 232 (1974). One of the plaintiffs in this case sued the State of Ohio in the state court. The Supreme Court of Ohio held that the state had immunity and was not subject to suit in tort without its consent and that this did not violate the equal protection clause of the fourteenth amendment. *Krause, Adm'r v. Ohio*, 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972), appeal dismissed for want of a substantial federal question, 409 U.S. 1052 (1972), rehearing denied, 410 U.S. 918 (1973).

who sought to obtain damages from the public treasury.⁸⁹ The Court, however, noted that where damages are sought against the officers personally, such a remedy may be permissible.⁹⁰ Because the Court did not see the suit as one in fact against the state, the key issue became whether the state officers were immune from liability under section 1983.

The Court appeared to recognize that government officials cannot function in an atmosphere that renders them liable for performing their official duties. The Court stated:

[O]ne policy consideration seems to pervade the analysis: the public interest requires decisions and action to enforce laws for the protection of the public. Mr. Justice Jackson expressed this general proposition succinctly, stating "it is not a tort for government to govern."⁹¹

The Court rejected an argument for absolute immunity. It noted that such an "extreme" position would make any executive act an executive fiat, the supreme law of the land.

Under our system of government, such a conclusion is obviously untenable. There is no such avenue of escape from the paramount authority of the Federal Constitution.⁹²

Thus, executive actions may be scrutinized by the courts. The Court held that in a 1983 suit:

[A] qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.⁹³

It can be contended, however, that the official immunity questions should never have been reached because it was in reality a suit against the state. The Sixth Circuit in *Krause v. Rhodes*⁹⁴ noted that although the suit was

⁸⁹ 416 U.S. at 238.

⁹⁰ *Id.*

⁹¹ *Id.* at 241, citing *Dalehite v. United States*, 346 U.S. 15, 57 (1953) (Jackson, J., dissenting).

⁹² *Id.* at 248-49, quoting Chief Justice Hughes in *Sterling v. Constantin*, 287 U.S. 378, 397-98 (1932).

⁹³ *Id.* at 247-48. See also *Barr v. Matteo*, 360 U.S. 564, 573-74 (1959) (Harlan, J., speaking for the plurality); *Moyer v. Peabody*, 212 U.S. 78, 85 (1909) (Holmes, J.). Both cases are discussed in *Scheuer*.

⁹⁴ 471 F.2d 430, 660 (6th Cir. 1972), rev'd sub nom., *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

"nominally" against the state officials, "in substance and effect [it was] against the State of Ohio since [it] directly and vitally affected the rights and interests of the State in the performance of its highest function, namely, the suppression of riots or insurrection and the protection of the public."⁹⁵ The suit, it was contended, seriously interfered with the public administration of the state government, and thus the state was in fact the real party in interest.

Although members of the executive branch do not have absolute immunity from section 1983 suits, the availability of the good faith/reasonable belief defenses announced in *Scheuer* at least affords the executive state official some protection. But it does not relieve the state of the necessity to expend large sums of public funds to defend the Governor in proving in court to a jury that he acted properly in calling out the National Guard to suppress an insurrection or rebellion and to defend, in criminal and civil cases, the members of the National Guard who responded to the call to duty.

The recent case of *Wood v. Strickland*⁹⁶ indicates that the qualified immunity announced in *Scheuer* is applicable even to those who engage in limited public duties, as long as they have discretionary responsibilities. The Court held that school officials were not liable for the imposition of disciplinary penalties so long as they could not reasonably have known that their action violated students' clearly established constitutional rights, or provided they did not act with malicious intention to cause constitutional or other injury.⁹⁷ In extending the qualified immunity from suits under section 1983 to school board members, the Court relied on *Scheuer*, *Pierson*, *Tenney*, and "strong public-policy reasons."⁹⁸ The Court stressed the need for board members to make discretionary judgments in much the same way that state officials must exercise their decision-making powers.

The problem with the immunity standard enunciated in *Wood*, however, was pointed out by Justice Powell in his dissent.⁹⁹ The *Scheuer* good faith/reasonable belief test was watered down to require school officials to act

⁹⁵ *Id.* at 433.

⁹⁶ 420 U.S. 308 (1975).

⁹⁷ *Id.* at 322. For an application of *Wood* to the board of trustees of a university, see *Martin v. University of Louisville*, 541 F.2d 1171, 1177 (6th Cir. 1976). See also *Wolfel v. Sanborn*, Nos. 76-1030-31 (6th Cir. May 2, 1977); *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir. 1975), *cert. denied*, 423 U.S. 930 (1975). Compare *Imbler v. Pachtman*, 424 U.S. 409, 419 (1976), which characterizes the *Wood* standard in the conjunctive, with *O'Connor v. Donaldson*, 422 U.S. 563, 577 (1975), which quoted the *Wood* standard in the disjunctive.

⁹⁸ 420 U.S. at 316-18.

⁹⁹ Chief Justice Burger and Justices Blackmun and Rehnquist joined in Justice Powell's opinion.

so as not to abridge a student's "unquestioned constitutional rights." The wisdom of this approach is suspect when one considers that many constitutional scholars' predictions on the outcome of future Supreme Court decisions have been wide of the mark.

One need only to look to the decisions of this Court—to our reversals, our recognition of evolving concepts, and our five-to-four splits—to recognize the hazard of even informed prophecy as to what are "unquestioned constitutional rights."¹⁰⁰

Surely lay elected school board members can hardly be held liable for failure to divine what even legal scholars are unable to safely predict.

The most recent case concerning section 1983 and sovereign immunity is *Imbler v. Pachtman*.¹⁰¹ In *Imbler* the Court held that a state prosecuting attorney, "in initiating a prosecution and in presenting the State's case," was absolutely immune from a civil suit for damages under section 1983.¹⁰² The Court favored an absolute immunity, rather than a qualified immunity, for the prosecutor so as not to limit the prosecutor's conduct at trial or otherwise "undermine [the] performance of his duties."¹⁰³ If the door for potential liability was left open, any defendant could harass the government's attorney by filing a lawsuit, exposing the prosecutor to a damage award and to the cost and time of defending against the claim. Furthermore,

¹⁰⁰ 420 U.S. at 329 (Powell, J., concurring in part and dissenting in part). See also *O'Connor v. Donaldson*, 422 U.S. 563, 577 (1975), wherein the Court, citing *Wood v. Strickland*, 420 U.S. at 322 stated "[A]n official has, of course, no duty to anticipate unforeseeable constitutional developments."

For a good example of the problems courts will face in applying the second element of the *Wood* test (i.e., clearly established constitutional rights) in situations where such violations are not so blatant, see *Wolfe v. Sanborn*, Nos. 76-1030-31 (6th Cir. May 2, 1977). Compare *Wolfe*, *supra*, with *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir. 1975), *cert. denied*, 423 U.S. 930 (1975).

¹⁰¹ 424 U.S. 409 (1976). The Court has resisted two recent attempts to expand the scope of section 1983. In *Rizzo v. Goode*, 423 U.S. 362 (1976) the Court held that the district court's order requiring the City of Philadelphia to improve its procedures for acting on citizen complaints about police abuses was an effort to do too much on the basis of too little. Besides problems with federalism and whether there existed a case or controversy, the Court remarked that the federal courts can only act on the basis of a constitutional violation. Herein, "the district court found that the responsible authorities had played no affirmative part in depriving any members of the two respondent classes of any constitutional rights." *Id.* at 377. In *Paul v. Davis*, 424 U.S. 693 (1976), the Court declined to expand section 1983 into a federal torts claim act. A flyer from the Louisville and Jefferson County Police Departments falsely identified Davis by photo and name as an active shoplifter. Davis sued area police chiefs under section 1983 claiming that his fourteenth amendment due process right to liberty had been infringed. The Court rejected the suit on two grounds: first, Davis had failed to specify an invasion of a specific constitutional guarantee; and second, mere allegation of stigma or loss of reputation without an attendant alteration of a legal right or status is insufficient to establish a liberty or property interest under the fourteenth amendment due process clause.

¹⁰² 424 U.S. 409, 431 (1976).

courts might be reluctant to grant post-conviction relief to the defendant for fear that the prosecutor may be later called to task for any error in judgment.¹⁰⁴

Necessarily, a grant of absolute immunity to all state officials would negate the remedy afforded by section 1983.¹⁰⁵ Thus, the *Imbler* Court remarked that "[Section] 1983 immunities were not products of judicial fiat that officials in different branches of government are differently amenable to suit under § 1983. Rather, each was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it."¹⁰⁶

When the *Imbler* Court examined the rationale of the common law rule and applied it to Section 1983, the adverse consequences flowing from a qualified protection required that an absolute immunity be afforded prosecutors. Yet the persuasiveness of this approach was sharply challenged by Justice White in his concurrence in the judgment in *Imbler*.

However, these adverse consequences are present with respect to suits against policemen, school teachers, and other executives, and have never before been thought sufficient to immunize an official absolutely no matter how outrageous his conduct. Indeed, these reasons are present with respect to suits against all state officials and must necessarily have been rejected by Congress as a basis for absolute immunity under 42 U.S.C. § 1983, for its enactment is a clear indication that at least some officials should be accountable in damages for their official acts. Thus, unless the threat of suit is also thought to injure the governmental decisionmaking process, the other unfortunate consequences flowing from damage suits against state officials are sufficient only to extend a qualified immunity to the official in question. Accordingly, the question whether a prosecutor enjoys an absolute immunity from damage suits under § 1983, or only a qualified immunity, depends upon whether the common law and reason support the proposition that extending absolute immunity is necessary to protect the *judicial process*.¹⁰⁷

An equally compelling conclusion, however, is that state executive officials and school board members, like prosecutors, should have absolute immunity. Of course such a step would require a legislative solution. The

¹⁰⁴ *Id.* at 424-28. The *Imbler* decision was recently followed in *Hilliard v. Williams*, 540 F.2d 220 (6th Cir. 1976), granting immunity from damages to the state prosecutor, despite his actions depriving the defendant of a fair trial. Similarly, *Flood v. Harrington*, 532 F.2d 1248, 1250-51 (9th Cir. 1976) and *Brawer v. Horowitz*, 535 F.2d 830 (3d Cir. 1976) both extended absolute immunity to federal prosecutors in reliance on *Imbler*.

¹⁰⁵ 424 U.S. at 433-34 (White, J., concurring).

¹⁰⁶ *Id.* at 421.

¹⁰⁷ *Id.* at 436-37 (White, J., concurring in judgment) (emphasis in original) (footnote omitted). Justices Brennan and Marshall joined in Justice White's concurrence.

doctrine of executive absolute immunity would be grounded on the fear that potential liability might deter an officer from executing his duties vigorously and decisively. In *Barr v. Matteo*,¹⁰⁸ Justice Harlan stated:

The reasons for the recognition of the privilege have been often stated. It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.¹⁰⁹

In answer to the contention that an absolute immunity for state officials would emasculate the purpose behind section 1983 actions, it should be said that, as noted in *Imbler*, the policy considerations which compel civil immunity for certain governmental officials do not also place them beyond the reach of the criminal law.¹¹⁰ In fact, the members of the Ohio National Guard in the Kent State case were subjected to a criminal trial in the district court which resulted in a judgment of acquittal.¹¹¹

The answers which the Supreme Court has given to the sovereign immunity problems beckon a new standard of review. The Court in *Scheuer v. Rhodes* cited the *Tenney* and *Pierson* cases which granted absolute immunity to legislators and judges respectively, and then went on to note that "[I]n the case of higher officers of the executive branch, however, the inquiry is far more complex. . . ."¹¹² It is ironic, however, that the *Scheuer* Court then concluded that only a qualified immunity is available to executive officers. One would think that where the day-to-day decision-making process of state executive officials is "more complex" or at least as equally complex as that of legislators and judges, absolute immunity would likewise be appropriate. If the temerity and courageousness required of the officeholder are proportionate to the amount of immunity protection, then all the more reason that all state officials should have immunity. On the one hand, the impeachment process and the ballot box are at least minimal controls on official behavior; on the other hand, Congress should reexamine the scope of section 1983 to determine the degree of immunity for state officials. The public should not be required to wade through the malaise of judicial opinions to learn to what extent their local school board members are amenable to

¹⁰⁸ 360 U.S. 564 (1959).

¹⁰⁹ *Id.* at 571.

¹¹⁰ 424 U.S. at 429.

¹¹¹ *United States v. Shafer*, 384 F. Supp. 496 (N.D. Ohio 1974).

¹¹² *Scheuer v. Rhodes*, 416 U.S. 232, 246 (1974).

civil damages or that their local prosecutor cannot be challenged in a civil suit, despite his deliberate suppression of exculpatory evidence, misconduct or negligence.

This article has examined recent federal court decisions on the erosion of sovereign immunity. Although the Supreme Court's decisions on the eleventh amendment in recent years have made it more difficult for a citizen to sue the state, litigants have been focusing on the state officials. Regardless, the raid on the state treasury still exists. Rather than placing sole reliance on section 1983 to check state executive officials misconduct, other alternatives that may afford some relief to the harried state taxpayers should be explored.¹¹³

¹¹³ If a claim is against the State of Ohio, a remedy is provided in the Ohio Court of Claims. OHIO REV. CODE ANN. § 2743.01-2743.20 (Page Supp. 1976).